Nos. 09-958, 09-1158 and 10-283

In the Supreme Court of the United States

TOBY DOUGLAS, DIRECTOR,
CALIFORNIA DEPARTMENT OF HEALTH CARE
SERVICES, PETITIONER
v.
INDEPENDENT LIVING CENTER OF SOUTHERN
CALIFORNIA, INC., ET AL.

TOBY DOUGLAS, DIRECTOR,
CALIFORNIA DEPARTMENT OF HEALTH CARE
SERVICES, PETITIONER
v.
CALIFORNIA PHARMACISTS ASSOCIATION, ET AL.

TOBY DOUGLAS, DIRECTOR,
CALIFORNIA DEPARTMENT OF HEALTH CARE
SERVICES, PETITIONER
v.
SANTA ROSA MEMORIAL HOSPITAL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Under 42 U.S.C. 1396a(a)(30)(A), a State's plan for medical assistance under the Medicaid Act must "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan * * * as may be necessary * * * to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." The question presented is as follows:

Whether Medicaid providers and beneficiaries may maintain a cause of action under the Supremacy Clause to enforce Section 1396a(a)(30)(A) by asserting that the provision preempts state law reducing reimbursement rates.

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INTEREST OF THE UNITED STATES

These cases concern whether Medicaid providers and beneficiaries can assert a federal cause of action directly under the Supremacy Clause to enjoin state Medicaid reimbursement rates as inconsistent with Section 1396a(a)(30)(A) of the Medicaid Act. At the Court's invitation, the Acting Solicitor General filed an amicus brief on behalf of the United States at the petition stage in No. 09-958.

STATEMENT

1. The Medicaid program, established in 1965 by Title XIX of the Social Security Act (SSA), 42 U.S.C. 1396 *et seq.*, is a cooperative federal-state program to provide medical care to needy individuals. *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990); *Atkins* v. *Rivera*, 477 U.S. 154, 156 (1986). State participation in Medicaid is voluntary, but those States that elect to participate must comply with requirements imposed by the Medicaid Act and by the Secretary of Health and Human Services (HHS) in her administration of the Act. *Wilder*, 496 U.S. at 502; *Rivera*, 477 U.S. at 157. Within those limits, however, each State enjoys great flexibility in both designing and administering its own program. *Alexander* v. *Choate*, 469 U.S. 287, 303 (1985).

To qualify for federal funds, participating States must submit to the Secretary, and receive approval of, a "plan for medical assistance" detailing the nature and scope of the State's Medicaid program. 42 U.S.C. 1396a(a); 42 C.F.R. 430.10; *Wilder*, 496 U.S. at 502. Among other requirements, a State's plan must

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan * * * as may be necessary

> to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

42 U.S.C. 1396a(a)(30)(A). The Secretary reviews the State's plan (and any amendments thereto) and determines whether it complies with the statutory and regulatory requirements. 42 U.S.C. 1316(a)(1) and (b), 1396a(b); 42 C.F.R. 430.10 *et seq.* If the Secretary disapproves the plan, the State can seek reconsideration and, ultimately, judicial review in the court of appeals. See 42 U.S.C. 1316(a)(2)-(5) and (b); 42 C.F.R. 430.18, 430.38, 430.60 *et seq.* If the State does not act in compliance with an approved plan, the Secretary may initiate a compliance action and withhold federal funds. See 42 U.S.C. 1396c; 42 C.F.R. 430.35.

2. The consolidated cases challenge several reductions in Medicaid payment rates previously adopted by the California Legislature:

Assembly Bill 5 (AB 5) (09-1158 Pet. App. 190-197): On February 16, 2008, the California Legislature passed AB 5, which reduced by ten percent payments under California's Medicaid program (Medi-Cal) to physicians, dentists, pharmacies, adult day health centers (ADHCs), clinics, health systems, and other providers, and similarly reduced payments for inpatient services provided by acute care hospitals not under contract with the State (non-contract hospitals). The reductions were scheduled to take effect on July 1, 2008. 09-958 Pet. App. 4.

Assembly Bill 1183 (AB 1183) (09-1158 Pet. App. 198-217): On September 30, 2008, California adopted AB 1183, which provided that the rate reductions established by AB 5 would expire on February 28, 2009. 09-958 Pet. App. 44. AB 1183 replaced the prior ten-percent rate reductions with a one-percent reduction, except that it applied a five-percent reduction to ADHCs, pharmacies, and hospital-based nursing-facility and subacute-care services, and continued to impose a ten-percent reduction for inpatient services provided by certain non-contract hospitals. *Id.* at 44, 189. The AB 1183 reductions were scheduled to take effect on March 1, 2009. *Id.* at 189. Those reductions have generally been superseded by subsequent legislation. See Pet. Br. 9 n.3.

Senate Bill 6 (SB 6) (09-1158 Pet. App. 218-227): In February 2009, California passed SB 6, which reduced a cap on the State's maximum contribution to wages and benefits paid to employees by counties for In-Home Supportive Services (IHSS). *Id.* at 65. That reduction was scheduled to take effect on July 1, 2009, but the California Legislature passed a superseding bill that delays implementation until July 2012 and requires a court to validate the reduction prior to implementation. See Cal. Welf. & Inst. Code § 12306.1(d)(6)-(7) (West Supp. 2011).

3. The consolidated certiorari petitions encompass five lawsuits that produced several district court and court of appeals opinions—all of which ultimately resulted in a court order preliminarily enjoining the challenged rate reductions as inconsistent with Section 1396a(a)(30)(A).

a. Respondents in No. 09-958 (*Indep. Living*)—a group of pharmacies, health care providers, senior citi-

zen groups, and individual Medi-Cal beneficiaries—filed a petition in state court for a writ of mandamus seeking to enjoin petitioner from implementing certain provisions of AB 5, and alleging that the rate reductions are inconsistent with the requirements of 42 U.S.C. 1396a(a)(30)(A) and are on that basis preempted. 09-958 Pet. App. 3-5. Petitioner removed the suit to federal court, and respondents moved for a preliminary injunction, which the district court denied. *Id.* at 5-6. Following circuit precedent, the district court explained that Section 1396a(a)(30)(A) does not confer individual rights enforceable under 42 U.S.C. 1983. No. 08-3315, 2008 WL 4298223, at *3 (C.D. Cal. June 25, 2008). The court then held that respondents did not have an implied right of action to pursue their preemption claim under the Supremacy Clause. *Id.* at *4-*5.

The court of appeals reversed. 09-958 Pet. App. 58-93. The court explained that "[t]he Supreme Court has repeatedly entertained claims for injunctive relief based on federal preemption, without requiring that the standards for bringing suit under [Section] 1983 be met." *Id.* at 68. The court continued: "For more than a century, federal courts have entertained suits seeking to enjoin state officials from implementing state legislation allegedly preempted by federal law." *Id.* at 83. Seeing "no reason to depart from the general rule in this case, or in this category of cases," the court held "that a party may seek injunctive relief under the Supremacy Clause regardless of whether the federal statute at issue confers any substantive rights on would-be plaintiffs." *Ibid.* This Court denied certiorari. 129 S. Ct. 2828 (2009).

On remand, the district court granted a preliminary injunction in relevant part. 09-958 Pet. App. 94-124. The court later clarified that its injunction applied only

prospectively, to payments made for services provided on or after the date on which the preliminary injunction was entered. *Id.* at 125-126, 128-129 n.1. The court of appeals affirmed the district court's order granting a preliminary injunction, but reversed the subsequent order granting only prospective relief. *Id.* at 1-38, 54-57.[1]

b. The petition in No. 09-1158 (*Cal. Pharm.*) encompasses three cases:

In *Independent Living Center* v. *Maxwell-Jolly*, No. 09-382 (C.D. Cal.) (*Independent Living*), a group of pharmacies, pharmacists, and other health care providers filed suit in federal court seeking an injunction to prevent petitioner from implementing the five-percent rate reduction for pharmacy services imposed by AB 1183, and alleging that it is inconsistent with the requirements of Section 1396a(a)(30)(A) and thus preempted. 09-1158 Pet. App. 53-54, 128-130, 133. The district court granted a preliminary injunction, and the court of appeals affirmed. *Id.* at 53-58, 128-151.

In *California Pharmacists Ass'n* v. *Maxwell-Jolly*, No. 09-722 (C.D. Cal.) (*California Pharmacists*), a group of ADHCs, hospitals, pharmacies, and Medi-Cal beneficiaries filed suit in federal court seeking an injunction to prevent petitioner from implementing certain five-percent rate reductions imposed by AB 1183, because, they allege, those reductions are inconsistent with Section 1396a(a)(30)(A). 09-1158 Pet. App. 84-87, 95-96, 106-108, 111-112. The district court preliminarily enjoined the rate reduction for ADHCs, but declined to enjoin the reduction for certain hospital services be-

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[1] Petitioner did not challenge the retroactive-payments holding in its petition. 09-958 Pet. 11 n.4.

cause, the court found, respondents had not demonstrated irreparable harm. *Id.* at 104, 126-127.[2]

The court of appeals affirmed in part, but held that the district court abused its discretion in denying a preliminary injunction with respect to the hospital-service rate reductions. 09-1158 Pet. App. 1-41. The court of appeals reasoned that "a finding of irreparable harm does not turn on 'whether the plaintiffs asserting the economic injury were in any sense intended beneficiaries of the federal statute on which the Supremacy Clause cause of action was premised.'" *Id.* at 38-39 (citation omitted); see *id.* at 46-48. Rather, the court continued, a "cause of action based on the Supremacy Clause obviates the need for reliance on third-party rights" and, therefore, respondents "could enforce the structural relationship between the federal and state governments so long as they had Article III standing as, essentially, private enforcers of the Supremacy Clause." *Id.* at 39 (citation omitted).

In *Dominguez* v. *Schwarzenegger*, No. 09-2306 (N.D. Cal.), recipients of services under the IHSS program and unions representing IHSS providers filed a putative class action in federal court seeking to enjoin petitioner from implementing the SB 6 cap on contributions to IHSS providers because, they alleged, it is preempted by Section 1396a(a)(30)(A). 09-1158 Pet. App. 61. The district court certified a class of IHSS consumers in certain counties and granted a preliminary injunction. *Id.* at 161-175; *Dominguez* v. *Schwarzenegger*, 270 F.R.D. 477 (N.D. Cal. 2010). The court of appeals affirmed. 09-1158 Pet. App. 59-83.

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[2] Because the district court had already enjoined the pharmacy rate reductions in *Independent Living*, it considered that request moot. 09-1158 Pet. App. 86-87.

c. Respondents in No. 10-283 (*Santa Rosa*), all non-contract hospitals, filed suit in federal court seeking an injunction to prevent petitioner from implementing the ten-percent rate reduction for non-contract hospitals imposed by AB 5, because, they allege, it is inconsistent with, and preempted by, Section 1396a(a)(30)(A).[3] 10-283 Pet. App. 10-13. The district court granted a preliminary injunction and the court of appeals affirmed. *Id.* at 1-4, 24.

4. In September and December 2008, the State submitted to HHS for approval State Plan Amendments (SPAs) for the rate reductions encompassed in AB 5 and AB 1183. On November 18, 2010, HHS disapproved the SPAs. No. 09-958 Gov't Pet. Br. App. 1a-4a. The disapproval letter explained that HHS could not approve the amendments because, among other things, "California has not demonstrated that it would meet the conditions set out in" Section 1396a(a)(30)(A), *id.* at 2a, specifically the condition "that State plans assure that 'payments [to providers] . . . are sufficient to enlist enough providers so that care and services are available under the [State's Medicaid] plan [to recipients] at least to the extent that such care and services are available to the general population in the geographic area,'" *ibid.* (quoting 42 U.S.C. 1396a(a)(30)(A)) (brackets in original). The State requested reconsideration of the disapproval, *id.* at 5a-7a, which triggered a formal administrative hearing process, see p. 3, *supra*. Several of the respondents in these cases have been granted leave to file briefs as amici curiae in the administrative proceeding. Pet. Br. 8 n.2.

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[3] Respondents had initially also sought to enjoin the ten-percent rate reduction imposed on non-contract hospital services by AB 1183, but, while the case was pending, that reduction was stayed by the Ninth Circuit in *California Pharmacists*. 10-283 Pet. App. 11 n.2.

SUMMARY OF ARGUMENT

1. Respondents do not dispute that there is no statutory private right of action to enforce 42 U.S.C. 1396a(a)(30)(A), either under 42 U.S.C. 1983 or directly under the Medicaid Act. Section 1396a(a)(30)(A) does not itself create an individual entitlement to a certain level of payments or to covered services that would be enforceable under this Court's decision in *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002). It instead provides broad criteria to guide HHS's determinations regarding the adequacy of the methods and procedures set out in a State's Medicaid plan.

2. This Court has never squarely decided if or when a private party has a cause of action to enjoin operation of state law as preempted by a federal statute that itself contains no private right of action and that does not confer individual rights enforceable under Section 1983. The Court has, however, decided dozens of preemption claims against state officials on their merits in cases brought in federal court, perhaps implicitly assuming that some federal cause of action exists in some circumstances. Although the Court has not explored the nature or source of the cause of action, its cases reflect a longstanding practice of permitting private parties to bring suit in federal court to enjoin state regulatory action from which the plaintiffs claim immunity under federal law.

The present cases do not require the Court either to reexamine that practice or otherwise attempt to catalog the range of circumstances under which a nonstatutory cause of action may be available to enjoin state officials from violating federal law. Respondents' claims differ from those in the Court's previous cases in at least two relevant respects. First, unlike the vast majority of the

cases in which this Court has entertained suits to enjoin state law as preempted by federal law, the present cases concern allegedly preempted state laws (*i.e.*, the State's challenged rate reductions) that are carried out as part of the State's implementation of the allegedly preemptive federal law (*i.e.*, Medicaid), a joint federal-state program enacted by Congress as part of the SSA, pursuant to Congress's powers under the Spending Clause. And second, respondents face no affirmative enforcement action by the State in which federal preemption would have been a defense at law, nor do they seek immunity from allegedly preempted state regulation that the State seeks to impose on them.

3. Assuming a nonstatutory cause of action is available in certain circumstances to vindicate the supremacy of federal law, the relevant features of the statutory scheme counsel against recognizing a nonstatutory cause of action for Medicaid providers and beneficiaries to enforce Section 1396a(a)(30)(A).

Section 1396a(a)(30)(A) differs from many other provisions of federal law in that it is part of a cooperative federal-state program enacted pursuant to Congress's Spending Clause authority. In creating such a program, Congress may vest the administering federal agency with exclusive responsibility for ensuring the State's compliance with particular provisions, or it may choose to supplement agency enforcement with private judicial enforcement. Here, Congress has not provided for private enforcement, either in a right of action under the statute itself or under 42 U.S.C. 1983; recognition of a nonstatutory private right of action would be inconsistent with the nature of the federal-state relationship in this setting. The Medicaid program operates in a manner similar in some respects to a contract between the

federal government and the State. As a general rule, third-party beneficiaries to a contract have no right to sue for enforcement unless they are the intended, rather than incidental, beneficiaries of the contract, such that they were intended to have a right to sue. In light of Congress's decision not to provide a right of action, this parallel counsels against recognizing a nonstatutory private right of action in this case.

With respect to federal-state cooperative programs under the SSA, the Court's cases and subsequent enactments reinforce that conclusion. Whereas the Court has assumed the existence of a nonstatutory cause of action in some circumstances, both the Court and Congress have assumed that no such cause of action exists to enforce the terms of federal-state programs under the SSA. That understanding is reflected in amendments to the SSA enacted by Congress in 1994.

Finally, regardless of whether it would be invoked in a Section 1983 suit or an injunctive action of the sort the court of appeals authorized here, the language of Section 1396a(a)(30)(A) itself provides little guidance to courts about how to apply and balance the general, and sometimes competing, policy objectives outlined in the provision. The language of Section 1396a(a)(30)(A) therefore calls for interpretation and evaluation by the responsible agency, rather than private judicial enforcement.

ARGUMENT

MEDICAID PROVIDERS AND BENEFICIARIES CANNOT MAINTAIN A CAUSE OF ACTION FOR EQUITABLE RELIEF TO ENFORCE 42 U.S.C. 1396a(a)(30)(A) AGAINST STATE OFFICIALS

The Department of Health and Human Services is committed to ensuring that State Medicaid programs

afford beneficiaries meaningful access to covered care and services. It is essential under 42 U.S.C. 1396a(a)(30)(A) that States carefully consider what impact payment rate changes may have on the availability of providers sufficient to furnish covered care and services to Medicaid beneficiaries. To that end, HHS recently promulgated a proposed rule to "create a standardized, transparent process for States to follow as part of their broader efforts to" comply with Section 1396a(a)(30)(A). 76 Fed. Reg. 26,342 (2011).

The question in these cases, however, does not concern the States' substantive obligations under Section 1396a(a)(30)(A), but whether Medicaid providers and beneficiaries have a right of action to sue state officials to enjoin the operation of state law that is assertedly not in compliance with Section 1396a(a)(30)(A). As we explain below, given the features of that provision and the statutory scheme in which it appears, no such private right of action is available.

A. No Federal Statute Provides A Private Cause Of Action To Enforce 42 U.S.C. 1396a(a)(30)(A) Against State Officials

Respondents do not assert a private right of action to enforce violations of 42 U.S.C. 1396a(a)(30)(A) under 42 U.S.C. 1983 or directly under the Medicaid Act. Nor have they disputed that no such statutory cause of action exists under this Court's precedents.

1. To seek redress under 42 U.S.C. 1983, "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing* v. *Freestone*, 520 U.S. 329, 340 (1997). In *Blessing*, the Court set forth three "factors" for courts to consider in deciding whether a statute confers a right enforceable under

42 U.S.C. 1983: (1) whether Congress "intended that the provision in question benefit the plaintiff," (2) whether "the right assertedly protected by the statute is" "so 'vague and amorphous' that its enforcement would strain judicial competence," and (3) whether the provision is "couched in mandatory, rather than precatory, terms." 520 U.S. at 340-341 (citations omitted). In *Gonzaga University* v. *Doe*, 536 U.S. 273, 283 (2002), the Court clarified that "anything short of an unambiguously conferred right" could not "support a cause of action brought under" 42 U.S.C. 1983, and emphasized that only "*rights*, not the broader or vaguer 'benefits' or 'interests,' * * * may be enforced under the authority of that section." *Ibid.*

After *Gonzaga*, nearly every court of appeals to consider the issue, including the Ninth Circuit, has correctly held that 42 U.S.C. 1396a(a)(30)(A) does not confer on Medicaid providers or beneficiaries individual private rights enforceable under 42 U.S.C. 1983. See *Equal Access for El Paso, Inc.* v. *Hawkins*, 509 F.3d 697, 703-704 (5th Cir. 2007) (providers and beneficiaries), cert. denied, 129 S. Ct. 34 (2008); *Mandy R.* v. *Owens*, 464 F.3d 1139, 1147-1148 (10th Cir. 2006) (providers and beneficiaries), cert. denied, 549 U.S. 1305 (2007); *Westside Mothers* v. *Olszewski*, 454 F.3d 532, 542-543 (6th Cir. 2006) (providers and beneficiaries); *New York Ass'n of Homes & Servs. for the Aging* v. *DeBuono*, 444 F.3d 147, 148 (2d Cir. 2006) (per curiam) (providers); *Sanchez* v. *Johnson*, 416 F.3d 1051, 1058-1062 (9th Cir. 2005) (providers and beneficiaries); *Long Term Care Pharmacy Alliance* v. *Ferguson*, 362 F.3d 50, 58-59 (1st Cir. 2004) (providers). But see *Pediatric Specialty Care, Inc.* v. *Arkansas Dep't of Human Servs.*, 443 F.3d 1005, 1016 (8th Cir. 2006) (declining to recon-

sider prior circuit precedent holding that Section 1396a(a)(30)(A) is enforceable by providers and beneficiaries through Section 1983), cert. granted, judgment vacated in part, 551 U.S. 1142 (2007) (mem.).[4]

As the courts of appeals have concluded, Section 1396a(a)(30)(A) does not contain "the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." *Gonzaga*, 536 U.S. at 287 (citation omitted). Section 1396a(a)(30)(A) provides that "methods and procedures" must be included in State plans "relating to" utilization and payment to assure that payments are "consistent with efficiency, economy, and quality of care" and are "sufficient to enlist enough providers so that care and services are available" to the extent that they "are available to the general population in the geographic area." 42 U.S.C. 1396a(a)(30)(A). That provision is directed at the "overall methodology" of the State plan. *Sanchez*, 416 F.3d at 1059. It makes no express mention of individual Medicaid beneficiaries and it speaks of Medicaid providers not as rights holders but as being "'enlisted' as subordinate partners in the administration of Medicaid services." *Ibid.* Like the "substantial compliance" provision at

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[4] In *Wilder* v. *Virginia Hospital Ass'n*, 496 U.S. 498 (1990), this Court held that the Boren Amendment, which required States to make payments based on rates that "are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities" providing inpatient hospital, skilled nursing, and other institutional services (42 U.S.C. 1396a(a)(13)(A) (1988)), created a right enforceable by Medicaid providers under Section 1983. In the Balanced Budget Act of 1997, Congress repealed the Boren Amendment and replaced it with a more limited requirement that States provide for public notice-and-comment participation in their ratemaking processes for such institutional services. Pub. L. No. 105-33, § 4711, 111 Stat. 507-508 (42 U.S.C. 1396a(a)(13)(A)).

issue in *Blessing*, Section 1396a(a)(30)(A), on its own, is a "yardstick" for designing and evaluating "*systemwide* performance" based on "the aggregate services provided by the State." 520 U.S. at 343 (concluding that "the requirement that a State operate its child support program in 'substantial compliance' with Title IV-D [of the SSA] was not intended to benefit individual children and custodial parents"). Section 1396a(a)(30)(A) thus does not itself unambiguously create an "*individual* entitlement to services." *Ibid.*

As the courts of appeals have also concluded, the language of Section 1396a(a)(30)(A) is "broad and nonspecific." *Long Term Care Pharmacy Alliance*, 362 F.3d at 58 (quoting *Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring in the judgment)); accord *Sanchez*, 416 F.3d at 1060. Neither the Act nor any regulations promulgated by the Secretary identify a standard by which these broad policy objectives—"efficiency," "economy," "quality of care," and "enlist[ing]" enough providers to make care and services "available * * * at least to the extent that such care and services are available to the general population in the geographic area," 42 U.S.C. 1396a(a)(30)(A)—are to be measured. Cf. *Blessing*, 520 U.S. at 340-341 (stating that enforcement of "vague and amorphous" provision "would strain judicial competence") (citation omitted); Gov't Br. at 15, *Belshe* v. *Orthopaedic Hosp.*, No. 96-1742 (Nov. 26, 1997) (making similar argument regarding "efficiency, economy, and quality of care"). Nor do they give any guidance as to how a court should balance such general, and sometimes competing, policy objectives.[5] See *Sanchez*, 416 F.3d at

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[5] The proposed rule recently promulgated by the Secretary does not provide "nationwide standards" or adopt a "singular approach" to com-

1059-1060. The inquiry necessarily turns on determinations and predictions of legislative fact of the sort appropriate for expert judgment by the State and then by HHS. Interpretation and weighing of these objectives in private Section 1983 suits would require the courts to make policy judgments in the first instance and would not provide the opportunity for broader public input often associated with agency decisionmaking. Cf. *Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring in the judgment).

2. It is also undisputed that the Medicaid Act itself affords providers and beneficiaries no statutory cause of action to enforce Section 1396a(a)(30)(A) against noncompliant States. See *Maine* v. *Thiboutot*, 448 U.S. 1, 6 (1980) (stating that the SSA, of which the Medicaid Act is a part, "affords no private right of action against a State"). "[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights," as is the case here, "there is no basis for a private suit, whether under [Section] 1983 or under an implied right of action." *Gonzaga*, 536 U.S. at 286; see *Suter* v. *Artist M.*, 503 U.S. 347, 363-364 (1992).

B. This Court Has Never Squarely Decided If Or When A Nonstatutory Cause Of Action For Equitable Relief On Preemption Grounds Should Be Recognized Under The Supremacy Clause Or Otherwise

The Court need not decide in these cases if or when a private party can bring a federal nonstatutory cause of action for equitable relief against state officials on preemption grounds as a general matter. These cases are

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pliance, 76 Fed. Reg. at 26,344, but instead requires States to develop data on access to services to facilitate compliance determinations by the State and HHS, *id.* at 26,349.

unlike the vast majority of preemption claims the Court has entertained to date, because they arise under a cooperative federal-state program under the SSA, enacted pursuant to Congress's powers under the Spending Clause. As explained in Part C, *infra*, the Court should resolve the question presented based on the particular features of that statutory scheme.

1. This Court has never squarely decided if or when a cause of action for equitable relief should be recognized directly under the Supremacy Clause, in the absence of a federal statutory cause of action. The Court has held that "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, * * * presents a federal question which the federal courts have jurisdiction under 28 U.S.C. [] 1331 to resolve." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). But the question at issue in *Shaw*, of subject matter jurisdiction, is analytically distinct from the question whether the Court should recognize a private right of action directly under the Supremacy Clause to seek injunctive relief against implementation of state law that allegedly conflicts with federal law. See *Verizon Md. Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 642-643 (2002) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case.") (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)); see *id.* at 642 (not deciding whether there was a private cause of action).

The Court has, however, decided dozens of preemption claims against state officials on their merits in cases

brought in federal court, perhaps implicitly assuming that some federal cause of action exists in some circumstances. See, *e.g.*, *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008); *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Arkansas Dep't of Health & Human Servs.* v. *Ahlborn*, 547 U.S. 268 (2006); *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396 (2003); *PhRMA* v. *Walsh*, 538 U.S. 644 (2003) (plurality opinion). Some Members of the Court have expressed approval in some contexts of a federal cause of action to prevent enforcement against plaintiffs of an allegedly preempted state law in the absence of a right under Section 1983. See, *e.g.*, *Golden State Transit Corp.* v. *City of L.A.*, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting) (plaintiffs may pursue preemption claim "by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes," because "[t]hese statutes do not limit jurisdiction to those who can show the deprivation of a right, privilege, or immunity secured by federal law within the meaning of [Section] 1983") (citing 28 U.S.C. 1331, 2201, 2202). Others have raised doubts about the existence of a nonstatutory private cause of action in certain contexts. See, *e.g.*, *PhRMA*, 538 U.S. at 683 (Thomas, J., concurring in the judgment) (noting "serious questions as to whether third parties may sue to enforce Spending Clause legislation—through pre-emption or otherwise"). The Court has never, however, directly addressed the existence, source, or scope of a nonstatutory private right of action to enjoin state officials from enforcing a state statute, regulation, or policy that allegedly conflicts with, and is thus preempted by, federal law.

2. The Court's cases do, however, reflect a long-standing practice of entertaining suits by private parties in federal court to enjoin state regulatory action to which the plaintiffs claim immunity under federal law. (Cf. *Golden State Transit*, 493 U.S. at 113 (Kennedy, J., dissenting) (The Court has long permitted "a private party [to] assert an immunity from state or local regulation on the ground that the Constitution or a federal statute, or both, allocate the power to enact the regulation to the National Government, to the exclusion of the States."). The underlying suit in *Ex parte Young*, 209 U.S. 123 (1908), is an early example. Some have described *Young* as invoking the accepted principle of equity jurisprudence that a plaintiff could bring a suit to bar an action at law against which the plaintiff in equity would have a valid defense, where the plaintiff in equity (the defendant in the prospective action at law) did not have an adequate remedy at law. See *Virginia Office for Prot. & Advocacy* v. *Stewart*, 131 S. Ct. 1632, 1643 (2011) (*VOPA*) (Kennedy, J., concurring) (describing the underlying suit in *Young* as "nothing more than the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law," and citing John Harrison, *Ex Parte Young*, 60 Stan. L. Rev. 989, 997-999 (2008));[6] cf. 4 John Norton Pomeroy, Jr., *Equity Jur-*

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[6] The origins of the cause of action underlying this Court's decision in *Young* present a question distinct from the *Young* doctrine as it relates to a State's Eleventh Amendment immunity from suit, and the origins of the cause of action therefore do not define the outer limits of the *Young* doctrine concerning the Eleventh Amendment. Thus, the principles of Eleventh Amendment immunity established in *Young* apply both where the plaintiff's cause of action is conferred by a federal statute, such as 42 U.S.C. 1983, and where the cause of action is judi-

risprudence §§ 1360-1364 (4th ed. 1919); 1 C.L. Bates, *Federal Equity Procedure* § 540 (1901).

Although the question now before the Court asks specifically whether respondents have an implied right of action directly under the Supremacy Clause, this Court's cases suggest that may not be the only, or even the best, understanding of the source of a nonstatutory cause of action to enjoin enforcement of state action that is inconsistent with federal law. The Supremacy Clause, as this Court has often stated, is not itself a source of federal rights, but rather "'secure[s]' federal rights by according them priority whenever they come in conflict with state law." *Golden State Transit*, 493 U.S. at 107 (quoting *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)) (brackets in original); cf. *Swift & Co.* v. *Wickham*, 382 U.S. 111, 116-129 (1965) (challenge to a state law as preempted did not require a three-judge court under former 28 U.S.C. 2281 (1964), which required such a court whenever a statute was sought to be enjoined "upon the ground of the unconstitutionality of such statute"). The Court's practice may be better understood as rooted in the courts' historical exercise of equitable powers.[7] But whether or not that

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cially fashioned. And as the Court recently reaffirmed in *VOPA*, "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" 131 S. Ct. at 1639 (quoting *Verizon Md.*, 535 U.S. at 645) (brackets in original).

[7] The Court's practice originated before the development of modern implied-cause-of-action jurisprudence. See *Bush* v. *Lucas*, 462 U.S. 367, 373 & n.10 (1983) (discussing "common-law approach to the judicial recognition of new causes of action"); *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001) (discussing development of Court's modern jurispru-

is the correct (or only) underpinning of the Court's practice of resolving preemption cases brought in federal court on the merits, the ability of private parties to obtain protection in the face of state compulsion that violates federal law has considerable historical grounding and appropriately vindicates the supremacy of federal law.

3. To resolve the question in these cases, however, the Court need not (and should not) consider the full range of circumstances in which a suit for injunctive relief would lie based on claimed preemption of state law. There are particular reasons why recognition of a nonstatutory private right of action to enforce the federal statutory provision at issue would not be compatible with the nature of the statute, the methods for its enforcement, and the plaintiffs' claim.

These cases are distinct from the many cases in which the Court has allowed claims to proceed with the assumption that a cause of action exists. Here, while respondents frame their claims as sounding in "preemption," they use that term "in a rather special sense," since, unlike many preemption cases, these cases "do[] not involve arguable federal pre-emption of a wholly

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dence). That practice may reflect a pre-*Erie* understanding that the "general" law recognized such suits in equity. See *Wheeldin* v. *Wheeler*, 373 U.S. 647, 651 (1963) (noting federal courts' creation of common-law rights before *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938)). Or, perhaps relatedly, it may reflect an understanding that the conferral of jurisdiction on a federal court allowed it to exercise such equitable authority in certain circumstances. See *Golden State Transit*, 493 U.S. at 119 (Kennedy, J., dissenting) (noting possibility of pursuing certain preemption claims "by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes"). In any event, the practice is now well established and serves an important purpose in vindicating the supremacy of federal law.

independent state program dealing with the same or a similar problem." *New York State Dep't of Social Servs.* v. *Dublino*, 413 U.S. 405, 411 n.9 (1973). Medicaid is a joint federal-state program enacted by Congress as part of the SSA, pursuant to its powers under the Spending Clause, and the State's rate reductions are carried out as part of the implementation of that program and in the context of the State's bilateral undertaking with the federal government. And, unlike the vast majority of the cases in which the Court has considered preemption claims brought in federal court on their merits, respondents face no affirmative enforcement action by the State in which federal preemption would have been a defense at law. Nor do they seek immunity from allegedly preempted state regulation that the State seeks to impose on them. The challenged Medi-Cal rate reductions do not regulate respondents' primary conduct. Rather, they offer providers less money for certain services than what allegedly should be paid under the cooperative federal-state Medicaid program—and, in turn, allegedly limit the availability of those services to beneficiaries.

4. Since *Gonzaga*, this Court has decided only one case, *PhRMA* v. *Walsh*, in which a private party sued in federal court to enjoin state officials from enforcing an allegedly preempted state law in circumstances that could arguably be described as similar to those here. The court below extensively relied on that case in reaching its conclusion that a nonstatutory cause of action is available to respondents here. See 09-958 Pet. App. 77-83. But that case differed in important respects from

these cases, and this Court's decision in any event provides little support for the decisions below.[8]

In *PhRMA*, a pharmaceutical manufacturers' association sued to enjoin a Maine program designed to obtain discounted drug prices for persons not covered by Medicaid. To encourage participation, Maine required drug companies that refused to participate in that program to submit their drugs to prior-authorization procedures under Medicaid. 538 U.S. at 649-650. The statutory (or nonstatutory) basis for the cause of action was not addressed by the Court. Cf. *id.* at 683 (Thomas, J., concurring in the judgment).[9] And, of course, the ques-

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[8] The government's amicus brief at the petition stage noted that the Court's decision in *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000), might not "necessarily fit [the] description" of a case in which "the plaintiff was regulated by the challenged state law and could have raised a preemption defense in any enforcement action for noncompliance." See 09-958 Gov't Pet. Br. 17-18. In *Crosby*, the plaintiff —a nonprofit corporation representing entities that did business with Burma—sought to enjoin enforcement of a state law that generally precluded state agencies from purchasing goods or services from companies that did business with Burma. 530 U.S. at 367-370. Although a company's contract ineligibility may not have been imposed through formal proceedings initiated by the State in which preemption could have been raised as a defense, the state law was an affirmative (and independent) exercise of the State's authority to impose and enforce what were essentially state regulatory standards. *Id.* at 373 n.7. Moreover, because the Constitution's allocation of foreign affairs powers to the national government was the basis for the alleged preemption, there was a particular structural foundation for a suit to enjoin the state law.

[9] In the court of appeals, and in this Court, the State did argue that PhRMA lacked prudential standing. See *PhRMA* v. *Concannon*, 249 F.3d 66, 72-73 (1st Cir. 2001), aff'd, 538 U.S. 644 (2003); Resp. Br. at *13-*17, *PhRMA*, *supra* (01-185). The court of appeals rejected that argument, 249 F.3d at 73, but this Court did not address it, perhaps because it did not view the issue as properly presented. Cf. Reply Br.

tion whether a cause of action exists, unlike the existence of federal jurisdiction, may be assumed without being decided. See *Burks* v. *Lasker*, 441 U.S. 471, 476 & n.5 (1979); cf. *Steel Co.*, 523 U.S. at 91 ("[D]rive-by jurisdictional rulings * * * have no precedential effect.").

However the Court might have resolved that question had it been presented, *PhRMA* arose in a different context than these cases. The question in *PhRMA* was not whether the State had complied with obligations imposed on it as a condition of receiving federal Medicaid funds, but whether the State's use of its Medicaid authority as a tool to impose on drug manufacturers an independent state rebate requirement was consistent with the Medicaid statute. Thus, unlike these cases, the state law at issue in *PhRMA* constituted an affirmative exercise of the State's authority to impose and enforce what were, in essence, state regulatory requirements directed to the pharmaceutical companies' primary conduct outside the Medicaid program—and the companies were, in effect, asserting an immunity from those regulations.

C. The Creation Of A Nonstatutory Private Cause Of Action For Equitable Relief To Enforce 42 U.S.C. 1396a(a)(30)(A) Against State Officials Would Not Be Compatible With The Nature Of The Statutory Scheme

These cases do not require the Court either to broadly determine whether and under what circumstances a nonstatutory cause of action might be available to enjoin state officials from violating federal law, or to reexamine its cases reaching the merits of preemption claims brought in federal court. Assuming a nonstatutory

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at *1 & n.1, *PhRMA*, *supra* (01-188) (arguing that the issue was not properly before the Court).

cause of action is properly available in certain circumstances to vindicate the supremacy of federal law, several considerations counsel against recognizing a nonstatutory private cause of action for Medicaid providers and beneficiaries to enforce Section 1396a(a)(30)(A).

1. First, as a general matter, Section 1396a(a)(30)(A) is a provision of a cooperative federal-state program enacted pursuant to Congress's Spending Clause authority, as to which Congress neither provided an express right of action for private parties nor conferred individually enforceable rights. Recognition of a nonstatutory cause of action for Medicaid providers and beneficiaries in this setting would be in tension with the nature of the federal-state relationship and the enforcement scheme contemplated by the statute.

a. In *Astra USA, Inc.* v. *Santa Clara County*, 131 S. Ct. 1342, 1345 (2011), the Court declined to recognize a third-party-beneficiary claim to enforce the terms of a contract between HHS and a drug company where the contractual terms were dictated by a federal-state cooperative program enacted under Congress's Spending Clause authority. There, as here, the parties did not dispute that there was no private right of action under the statutory provision at issue; the statute instead vested enforcement authority in HHS. *Id.* at 1347-1348. The Court relied in part on the fact that, in those circumstances, to allow a suit on a third-party-beneficiary rationale would have rendered meaningless the absence of a private right of action under the statute itself. *Id.* at 1348. Such a suit, the Court explained, "is in essence a suit to enforce the statute itself." *Ibid.* In those circumstances, the Court concluded, it would make "scant sense" to allow that claim to go forward "[n]o matter the clothing in which [the plaintiffs] dress their claims." *Id.*

at 1345 (quoting *Tenet* v. *Doe*, 544 U.S. 1, 8 (2005)) (first brackets in original).

Similar considerations are present here. If private parties who lack a statutory cause of action could simply style their suit as a preemption action to enjoin state officials from enforcing a state law that was adopted to implement the State's undertakings pursuant to the program, the result would be in considerable tension with Congress's decision not to confer a private right of action to enforce state compliance. In *Suter*, for example, the plaintiffs' claim that the State had not made "reasonable efforts" at family reunification in its judicial proceedings, 503 U.S. at 352, could have been re-pleaded as a claim that the State's inadequate efforts were preempted by the "reasonable efforts" provision of the Adoption Act. The State's alleged failure to abide by Title IV-D's "substantial compliance" requirements in *Blessing*, 520 U.S. at 332-333, would have been cognizable had plaintiffs instead challenged the State's program as preempted by the "substantial compliance" provision. And, in *Alexander* v. *Sandoval*, 532 U.S. 275, 279 (2001), the plaintiffs could have pursued their claim that the State's policy of offering its driving-license exam only in English violated the Department of Justice's disparate-impact regulation by the simple expedient of filing suit "under the Supremacy Clause," instead of under Title VI of the Civil Rights Act of 1964.

That most of the respondents here are seeking only injunctive relief (but see note 1, *supra*) does not mitigate the inconsistency between private judicial enforcement and the federal-state cooperative scheme that Congress created. Significantly, in all of the cases mentioned above, the plaintiffs sought only prospective relief and not damages. *E.g.*, *Suter*, 503 U.S. at 352; *Blessing*,

520 U.S. at 337; *Sandoval*, 532 U.S. at 279; see also *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 504 & n.4 (1990).[10]

b. This Court has often said that a law enacted pursuant to the Spending Clause operates "in the nature of a contract" between the federal government and the State. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981); see *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006). This Court has also recognized that neither the federal Spending Clause statute itself nor the resulting arrangement with a fund recipient constitutes an ordinary contract. See *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985).[11] But private parties are in a situation similar to that of third-party beneficiaries. Under traditional contract principles, third parties have judicially enforceable rights only if they are intended, rather than incidental, beneficiaries of the contract, and only if "recognition of a right to performance in the beneficiary is appropriate

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[10] Section 1983 does not provide a cause of action against States or state employees in their official capacity for damages. See *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989). And, unless properly abrogated, sovereign immunity would bar retrospective damage remedies in cases asserting an implied statutory right of action against state officials acting in their official capacity. See *Quern* v. *Jordan*, 440 U.S. 332, 337-349 (1979); *Edelman* v. *Jordan*, 415 U.S. 651, 677 (1974).

[11] The Act of Congress establishing the joint federal-state program, for example, remains binding law with the full force and preemptive authority of federal legislation under the Supremacy Clause. *E.g.*, *Bennett* v. *Arkansas*, 485 U.S. 395, 397 (1988) (per curiam) (state law providing for attachment of federal benefits paid to state prisoners preempted by SSA); *Philpott* v. *Essex County Welfare Bd.*, 409 U.S. 413, 417 (1973) (state law requiring reimbursement through payment of federal disability benefits preempted by SSA).

to effectuate the intention of the parties." Restatement (Second) of Contracts § 302(1) (1981). When the contract is a government contract, "[t]he distinction between an intention to benefit a third party and an intention that the third party should have the right to enforce that intention" is vigorously enforced. 9 John E. Murray, Jr., *Corbin on Contracts* § 45.6, at 92 (rev. ed. 2007); see *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U.S. 220, 230-231 (1912). In light of Congress's decision not to confer individual rights under Section 1396a(a)(30)(A), see pp. 13-15, *supra*, the analogy to third-party beneficiaries counsels against creating a nonstatutory right of action to enforce Section 1396a(a)(30)(A).

2. This Court's cases and subsequent enactments reinforce the conclusion that no extra-statutory cause of action should be recognized to enforce provisions of the federal-state cooperative programs enacted as part of the SSA, including Section 1396a(a)(30)(A). In contrast to an implicit assumption that a nonstatutory private cause of action was available in the numerous preemption cases this Court has decided in other contexts (see pp. 17-21, *supra*), the shared assumption of the Court and Congress appears to have been that no such cause of action is available to challenge actions by state officials on the ground that they are allegedly inconsistent with provisions of the SSA that govern state plans under cooperative federal-state programs.

a. In *Thiboutot*, *supra*, this Court first made explicit the conclusion that the cause of action conferred by 42 U.S.C. 1983 is presumptively available not only to redress violations of the Constitution or statutes assuring equal protection, but to redress violations of all federal statutes that confer individual rights, including

statutes enacted pursuant to Congress's authority under the Spending Clause. In addition to the plain language of 42 U.S.C. 1983 (namely, the general reference to "and laws"), the Court relied heavily on its prior cases, which it read as resolving "any doubt" about the meaning of that phrase. *Thiboutot*, 448 U.S. at 4-5. In noting that several of its prior cases involving the SSA had (explicitly or implicitly) relied on the availability of a cause of action pursuant to Section 1983 for claims based on violations of federal statutes, *id.* at 4-6, the Court clearly viewed Section 1983 as the sole source of a private right of action to enforce statutory provisions governing joint federal-state programs under the SSA. As the Court explained, in all of those cases, Section 1983 "was necessarily the exclusive statutory cause of action because, as this Court held in [*Edelman* v. *Jordan*, 415 U.S. 651, 673-674 (1974)], the SSA affords no private right of action against a State." *Thiboutot*, 448 U.S. at 6. If a nonstatutory cause of action arising under the Supremacy Clause or on some other basis had been readily available, the critical premise underlying the Court's reasoning—that "any doubt" as to the meaning of "and laws" in Section 1983 had already been resolved—would have been unfounded. Each of the prior cases equally could have been explained as arising under that nonstatutory cause of action. See *ibid.* (string cite of cases seeking prospective relief from state programs alleged to be "inconsistent" with provisions of the SSA). A holding by this Court that a nonstatutory private cause of action is *also* available (and always has been) would be in considerable tension with that decision.

b. Two identical provisions of the SSA, added by Congress in 1994, similarly point to the conclusion that provisions of the SSA are privately enforceable only

when a cause of action lies under 42 U.S.C. 1983 or the provision at issue. After this Court's decision in *Suter*, Congress adopted amendments to the SSA that provide:

> In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter v. Artist M., 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in Suter v. Artist M. that section 671(a)(15) of this title is not enforceable in a private right of action.

42 U.S.C. 1320a-2, 1320a-10. The Conference Report explained that "[t]he intent of this provision is to assure that individuals who have been injured by a State's failure to comply with the Federal mandates of the State plan titles of the [SSA] are able to seek redress in the federal courts to the extent they were able to prior to the decision in *Suter* v. *Artist M.*" H.R. Conf. Rep. No. 761, 103d Cong., 2d Sess. 926 (1994). The Report also made clear, however, that there was "no intent to overturn or reject the determination in *Suter* that the reasonable efforts clause to Title IV-E does not provide a basis for a private right of action." *Ibid.*

The amendments indicate that Congress (like the Court) was acting on the understanding that a private right of action would be available to enforce the state

plan provisions of the joint federal-state programs under the SSA only when such a cause of action is available under 42 U.S.C. 1983 (or under established implied-statutory-private-right-of-action principles). Where a cause of action is not available under either Section 1983 or the particular provision of the SSA at issue, the amendments appear to contemplate that the provision simply will not be privately enforceable.

3. Finally, Section 1396a(a)(30)(A)'s "broad and nonspecific" language counsels against recognition of a nonstatutory private right of action. The terms the courts of appeals have found to be prohibitively "broad and diffuse" for purposes of Section 1983, see *Sanchez*, 416 F.3d at 1060; pp. 15-16, *supra*, would be no less so in the context of a private suit for injunctive relief brought under the Supremacy Clause or otherwise. Absent more specific guidance about how to measure a State's compliance with the general standards of economy, efficiency, quality of care, and sufficiency of payments to ensure access, such determinations are ones properly made by HHS through the exercise of its expert judgment and its bilateral relationship with the State.

As previously discussed (p. 3, *supra*), the Secretary is required to review and approve (or disapprove) the State's plan and any plan amendments to ensure compliance with Section 1396a(a)'s requirements, including Section 1396a(a)(30)(A). If the Secretary disapproves a State plan (or plan amendment), the State may seek reconsideration (as the State did here, p. 8, *supra*). And if the decision is upheld, the State may petition for judicial review in the court of appeals. Apart from the plan approval process, if the State plan does not comply with Section 1396a(a)(30)(A), the Secretary can also undertake a compliance action and withhold federal funds.

That administrative process brings to bear "the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking." *Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring in the judgment).[12]

Recognition of a nonstatutory private right of action would mean that multiple federal courts across different jurisdictions would similarly (and perhaps simultaneously) be called on to decide such compliance questions. Judicial proceedings would move forward on different evidentiary records and result in different factual findings, which would in turn be reviewable on appeal only under the "clearly erroneous" standard, Fed. R. Civ. P. 52(a)(6). And, as evidenced by the wide array of approaches the courts of appeals have taken in their interpretation of Section 1396a(a)(30)(A) (see 09-958 Gov't Pet. Br. 10-11), the proceedings would inevitably lead to the development and application of different legal standards. See *Sanchez*, 416 F.3d at 1061 (noting "that exclusive agency enforcement might fit the scheme better than a plethora of private actions threatening disparate outcomes") (internal quotation marks and citation omitted).

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[12] The United States is not suggesting that Congress has "displayed an intent not to provide the 'more complete and more immediate relief' that would otherwise be available under *Ex parte Young*." See *Verizon Md.*, 535 U.S. at 647 (quoting *Seminole Tribe* v. *Florida*, 517 U.S. 44, 75 (1996)); *VOPA*, 131 S. Ct. at 1639 n.3. Respondents are essentially asking this Court to create a federal common-law cause of action. Whether or not "these statutory provisions * * * provide a comprehensive enforcement mechanism so as to manifest Congress' intent to foreclose" private remedies, they do demonstrate that the absence of a private remedy would not render Section 1396a(a)(30)(A) a "dead letter." *Suter*, 503 U.S. at 360-361; see *Gonzaga*, 536 U.S. at 289-290.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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